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Office of the Attorney General



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April 3, 2003

Chairman Sara Kyle
Tennessee Regulatory Authority
460 James Robertson Parkway
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**RE: In Re: Small Telephone Companies Tariff Filings Regarding Reclassification
of Pay Telephone Service as Required by Federal Communications
Commission, FCC Docket 96-128
Docket No.: 97-01181**

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Attorney General's Brief in Response to the Coalition of Tennessee Small Local Exchange Companies' Supplemental Brief Concerning Cost-Based Rates and Removal of Subsidies Pursuant to 47 U.S.C. 276(b)(1)(B) for filing in the above-referenced matter. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Shilina B. Chatterjee".

Shilina B. Chatterjee
Assistant Attorney General

Enclosures

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE: SMALL TELEPHONE
COMPANIES TARIFF FILINGS
REGARDING RECLASSIFICATION
OF PAY TELEPHONE SERVICE AS
REQUIRED BY FEDERAL
COMMUNICATIONS COMMISSION
FCC Docket 96-128

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Docket 97-01181

**ATTORNEY GENERAL'S BRIEF IN RESPONSE TO THE SUPPLEMENTAL BRIEF
OF THE COALITION OF TENNESSEE SMALL LOCAL EXCHANGE COMPANIES
CONCERNING COST-BASED RATES AND REMOVAL OF SUBSIDIES PURSUANT
TO 47 U.S.C. § 276(b)(1)(B)**

The Attorney General's Office, through the Consumer Advocate and Protection Division ("Consumer Advocate"), participates as an intervener in this matter before the Tennessee Regulatory Authority ("TRA").

The Consumer Advocate submits this brief in response to the TRA's Order issued on March 10, 2003, requiring that the parties respond to the supplemental briefs filed on February 26, 2003, concerning cost-based rates and removal of subsidies under 47 U.S.C. §276(b)(1)(B).

STATEMENT OF FACTS

In Section 276 of the Federal Telecommunications Act of 1996 (the "Act"), Congress mandated that the Federal Communications Commission promulgate rules requiring all telephone companies to file tariffs in order to reclassify payphones and remove subsidies from

payphone operations and other classes of services.¹ The FCC directed that state regulatory agencies to execute the mandate of Congress and they issued several orders providing clarification and direction to effectuate the goals of Section 276.

In accordance with the FCC guidelines, all telephone companies with payphones in Tennessee filed tariffs with the TRA. After the tariffs were filed, AT&T Communications of the South Central States ("AT&T"), Tennessee Payphone Owners Association ("TPOA"), MCI Telecommunications Corporation ("MCI") and the Consumer Advocate filed respective petitions to intervene and the TRA began a contested case (Docket No. 97-00409). Thereafter, Docket No. 97-00409 was bifurcated. The hearing officer determined that one proceeding would be held for BellSouth Telecommunications, Inc. ("BellSouth"), United Telephone - Southeast, Inc. ("UTSE") and Citizens Telecommunications Company of Tennessee L.L.C. and Citizens Telecommunications Company of the Volunteer State L.L.C. (collectively "Citizens") (Docket No. 97-00409) and another proceeding would be held for Claiborne Telephone Co., Ooltewah/Collegedale Telephone Co., Ardmore Telephone Co., Adamsville Telephone Co., Millington Telephone Co., Peoples Telephone Co., West Tennessee Telephone Co., United Telephone Co., Crockett Telephone Co., Loretto Telephone Co., and the Telephone Data System Companies ("TDS"), which include Tennessee Telephone Co., Humphreys County Telephone Co., Concord Telephone Exchange, Inc. and Tellico Telephone Co., (collectively "Small Telephone Companies" or "Coalition") (Docket No. 97-01181). The reason for granting the

¹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541 (Sept. 20, 1996) ("Report and Order").

bifurcation was to spare the small telephone companies the expense of preparing and filing cost studies concerning payphone rates.²

ARGUMENT

I. BOTH THE FCC AND THE TRA HAVE ACKNOWLEDGED THAT 47 U.S.C. §276(b)(1)(B) APPLIES TO ALL LECs

When Congress enacted Section 276, they intended that the rules issued by the FCC promote competition among payphone service providers to achieve widespread deployment of payphone services for the benefit of the general public.³ Congress explicitly stated that payphones be reclassified and that all subsidies be removed from payphone rates.⁴ Section 276 of the Act prohibits payphone rates from including subsidies to or from other telecommunications services and creating preferences to a LEC's payphone operation.⁵ At issue in the present docket is the application of Section 276(b)(1)(B) to the small telephone companies. Both the FCC and the TRA have already recognized that Section 276(b)(1)(B) applies to all LECs, including both the BOCs and non-BOC LECs.⁶ Also, the FCC specified that Section 276(b)(1)(B) is broader than other sections and "it applies to all LECs and is not limited to the

² See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Preliminary Report and Recommendation of the Hearing Officer, TRA Docket No. 97-00409 (May 29, 1997).

³ 47 U.S.C. § 276(b)(1).

⁴ 47 U.S.C. § 276.

⁵ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, pp. 16-17 (February 1, 2001).

⁶ See *Order Setting Pre-Hearing Conference*, March 12, 2003, p. 2 citing *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶34, FN 80 ("Second Wisconsin Order").

BOCs.”⁷

Although removing subsidies was clearly targeted to all payphone providers, the FCC acknowledged in the Second Wisconsin Order that they had not been given specific authority by Congress to apply cost-based rates to the non-BOC LECs.⁸ However, the FCC concluded that in order to achieve this result for all payphones, costs must be determined by an appropriate forward-looking, economic cost methodology consistent with the principles articulated in the Local Competition Order.⁹ They strongly recommended that the states apply the same cost-based requirement to all LECs, whether a BOC or non-BOC, so that Section 276 would be applied to all payphones and be carried out across the board.¹⁰ As a practical matter, using a cost-based method concerning rates is the best available means for eliminating payphone subsidies and effectuating the goals of Section 276.

A. All LECs in the State of Tennessee Must Eliminate Payphone Subsidies to Comply with Section 276(b)(1)(B) of the Telecommunications Act of 1996 and Tennessee Law.

In an effort to follow the prior directives of the TRA concerning this issue, the TRA should apply Section 276(b)(1)(B) to all LECs so payphone subsidies are eliminated. As previously argued, the plain language of Section 276(b)(1)(B) dictates application to both

⁷ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶34, FN 80 (“Second Wisconsin Order”).

⁸ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶42 (“Second Wisconsin Order”).

⁹ See *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (Aug. 8, 1996) (“Local Competition Order”). See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶2 (“Second Wisconsin Order”).

¹⁰ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶31 & ¶42 (“Second Wisconsin Order”).

intrastate and interstate subsidies. Section 276(b)(1)(B) states that all action be taken to prescribe regulations that

- (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A).

Additionally, the FCC stated in their initial Report and Order that to achieve the goals of Section 276, the rules and regulations concerning payphones must be applied to “to all the players in the industry” to allow for a competitive payphone industry.¹¹ The intent of Congress was to promote an open and competitive market in the payphone industry. In placing uniform rules and regulations on the industry as whole, without allowing for any exemptions, the FCC was promoting an equal playing field in the market for all carriers and achieving the goals and mandate of Congress.

B. The Cost-Based Methodology Should Be Applied to All LECs to Promote Consistent Public Policy Concerning Payphones

In the Interim Order in the prior docket concerning payphones (Docket 97- 00409), the TRA formally adopted Section 276 and FCC requirements as policy.¹² The TRA determined that in accordance with Section 276 and state law, they ordered that (1) the rates adopted by the TRA were to be applied to all providers of payphone service, (2) the rates for payphones must

¹¹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, & 8 (Sept. 20, 1996) (“Report and Order”).

¹² See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 2 (February 1, 2001).

be cost-based, non-discriminatory and consistent with the provisions of Section 276 and Tenn. Code Ann. § 65-5-208(c), (3) payphone rates should include a monthly flat rate component and a usage rate component, and (4) the methodology used to calculate the cost-based rates would be the new services test which included cost, overhead expenses and a reasonable return.¹³ These requirements were ordered by the TRA upon BellSouth and three non-BOC LECs in Tennessee.

The TRA should apply the same principles to the LECs in this docket. It is within the realm of the TRA to establish rates for the payphones of the non-BOC LECs. Further, the FCC stated in the Second Wisconsin Order that nothing prevented the states from applying the new services test to all non-BOC LECs, whether rural or not, and stated that the states can determine whether it is appropriate and warranted.¹⁴ The new services test was used to calculate cost-based rates of BellSouth and the three other non-BOC LECs. The TRA clearly has the authority to implement cost-based rates in this docket since they previously exercised their authority in implementing the cost-based methodology not only upon BellSouth, a BOC, but also to the other non-BOC LECs.

II. PRIOR PRECEDENT ESTABLISHED BY THE TRA NECESSITATES THE SAME COURSE OF ACTION BE TAKEN IN THIS DOCKET TO SATISFY THE REQUIREMENTS OF 47 U.S.C. § 276(b)(1)(B) AND TENN. CODE ANN. § 65-4-123.

The TRA acknowledged in the prior docket that Section 276 of the Act required LECs to

¹³ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Final Order, TRA Docket No. 97-00409, p. 15 (June 12, 2002).

¹⁴ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶67 ("Second Wisconsin Order").

remove any subsidies attributable to payphones from intrastate rates¹⁵ and reaffirmed that Section 276(b)(1)(B) prohibits subsidization of payphone rates. On May 29, 1997, the TRA's hearing officer issued a Preliminary Report and Recommendation in Docket Number 97-00409 stating that Section 276 applied to all telephone carriers.¹⁶ Thereafter, in the Interim Order, the TRA stated:

The FCC has indicated that the states must use the 'new services test' when establishing intrastate payphone rates pursuant to Section 276. The new services test creates a price floor equal to the direct or economic cost of providing a service, including a reasonable rate of return. Lastly, the rates established in this docket must be cost-based and non-discriminatory, which is consistent with the mandate of Section 276.¹⁷

Since the TRA has applied the cost-based methodology in the prior docket to other LECs, the TRA should apply the same principles in this docket.

The TRA stated in the Interim Order in Docket 97-00409 that the purpose of the docket was to establish payphone rates and remove any subsidies benefitting LEC's payphone affiliates and operations. Since this docket is an extension of the prior docket involving the same issues, it is essential that the same criteria be applied to the small telephone companies.

In Docket 97-00409, the TRA developed a fair and consistent policy to remove subsidies

¹⁵ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, pp. 23-24 (February 1, 2001).

¹⁶ See *Preliminary Report and Recommendation of the Hearing Officer, All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by the Federal Communications Commission Docket 96-126*, Docket 97-00409 (May 29, 1997).

¹⁷ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, pp. 16-17 (February 1, 2001).

and provide for a reasonable return. In order to realize the goals of Section 276, it is necessary that the TRA order the same requirements upon all payphones in Tennessee. The FCC has encouraged the states to use cost-based rates for all LECs so as to "extend the pro-competitive regime" to payphones as Congress intended.¹⁸ The body of law and regulation in this state is based on consistency and fair application. The TRA and the parties have already endured a long contested case in Docket 97-00409. There is no need for a similar struggle in this docket.

Since the TRA is left with the duty of eliminating subsidies for non-BOC LECs, it is incumbent upon the TRA to follow precedent that they established. The TRA has previously followed the FCC's recommendations to ensure that the goals of the Telecommunications Act of 1996 and state law are effectively carried out in the State of Tennessee. The TRA should proceed in this docket in the same manner they proceeded in the prior docket.

The TRA understood that bifurcation was purely for the purpose of relieving the small payphone companies from enduring the expense of cost-studies and extensive legal representation.¹⁹ Then Chairman Greer stated that the "law applies to everybody."²⁰ The primary reason the small payphone companies were excluded from the 97-00409 proceeding was to prevent them from spending resources and capital on audits and litigation. The Consumer Advocate and Chairman Greer all voiced concerns on the record that if the burden became too great on the smaller companies, that they would possibly eliminate payphones

¹⁸ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Memorandum Opinion and Order (January 31, 2002), ¶67 ("Second Wisconsin Order").

¹⁹ Pre-Hearing Conference on May 29, 1997 in Docket No. 97-00409.

²⁰ Transcript of Prehearing Conference in Docket 97-00409, May 29, 1997, p. 30, line 10.

completely.²¹ Simply, the original docket was bifurcated into a separate docket to aid the small companies. It did not mean that they were alleviated of any burden to comply with Section 276 or were not subject to adjusting rates and removing subsidies. The purpose of both these dockets is to promote competition in the payphone arena, and the TRA must be consistent and follow their own prior directives and precedent.

In the prior docket, three companies were non-BOC LECs and the TRA ordered them to use cost-based rates and remove all subsidies from their payphones.²² They even voted unanimously to direct the LECs to correct their subsidy calculations to remove any subsidies.²³ Specifically, the TRA stated that payphone rates should include a monthly flat rate component and a usage rate component.²⁴ They also adopted the new services test as the appropriate test to use in calculating payphone access line rates.²⁵

The appropriate step is for the TRA to apply the same policy as adopted in Docket 97-00409 and apply it to this docket, so as to avoid any further burden and to conclude this docket that has been protracted for six years. It is essential that all payphones in Tennessee meet the mandate of Section 276. This promotes congruence and carries out the intentions of the 1996 Telecommunications Act. As we are well aware, the goal of Section 276 is to promote parity

²¹ Transcript of Prehearing Conference in Docket 97-00409, May 29, 1997, p. 26-30.

²² See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 24 (February 1, 2001).

²³ See *id.*

²⁴ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 28 (February 1, 2001).

²⁵ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, pp. 28-29 (February 1, 2001).

and competition among all telephone companies operating payphones.

III. THE COALITION OF TENNESSEE SMALL TELEPHONE COMPANIES INCORRECTLY STATED THAT 47 U.S.C. §276(b)(1)(B) ONLY APPLIES TO SUBSIDIES AND NOT RATES

The Coalition of Tennessee Small Telephone Companies argues that cost-based rates are not required because Section 276(b)(1)(B) only applies to “certain subsidies” and does not apply to payphone rates.²⁶ Although §276(b)(1)(B) does not explicitly use the words “rates,” that does not mean that cost-based rates are not to be used. In Docket No. 97-00409, the TRA held that payphone rates included a flat rate component to recover non-traffic sensitive costs of the loop and a usage rate component to recover the traffic sensitive costs of the switched network.²⁷ Subsidies are directly correlated to rates and as such the cost-based methodology should be used to effectuate the intent of Section 276(b)(1)(B).

The Coalition incorrectly states that rates are not related to the removal of subsidies. LECS filed tariffs that removed the calculated payphone subsidies from intrastate rates by reducing access rates.²⁸ In order to remove subsidies, LECs must file reclassification tariffs to adjust intrastate rates to reflect the corrected subsidy calculations so that the proper amount of payphone subsidies are permanently removed from regulated operations.²⁹ Removal of

²⁶ See *Brief of Coalition of Tennessee Small Local Exchange Companies Regarding the Requirements of and Compliance with 47 U.S.C. 276(b)(1)(B)*, TRA Docket 97-01181, p. 3 (February 26, 2003).

²⁷ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 15 (February 1, 2001).

²⁸ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 24 (February 1, 2001).

²⁹ See *id.*

subsidies must be permanent.

IV. 47 U.S.C. § 276 AND TENNESSEE LAW REQUIRES PAYPHONE RATES BE NONDISCRIMINATORY

Section 276 and Tennessee law requires that payphone rates be nondiscriminatory.³⁰ The TRA recognized in Docket No. 97-00409 that payphone rates must be nondiscriminatory.³¹ Moreover, the TRA also noted that Section 276 prohibits certain anti-competitive practices, such as cross-subsidization, preferences and price discrimination.³²

In addition, Section 276 states the FCC directives must ensure that they promote the nondiscriminatory edict of Congress in order to advance the procompetitive goals and policies of the Act. If the FCC only required that Section 276 be applied to BOC's, the rules would be contrary to the goals and intent of Section 276.

State law requires that any telephone services provided in the State of Tennessee must be nondiscriminatory. Tenn. Code Ann. § 65-5-201 states that nondiscriminatory or preferential rates are not permitted and Tenn. Code Ann. § 65-4-124(a) states that all telecommunications services shall provide non-discriminatory interconnection to their public networks. Also, the general telecommunications services policy set forth by the General Assembly declares that the goal of Tennessee "is to foster the development of an efficient, technologically advanced,

³⁰ 47 U.S.C. §276(b)(1)(B) and Tenn. Code Ann. 65-5-208(c).

³¹ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p.17 (February 1, 2001).

³² See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 23 (February 1, 2001) citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541 ¶2 (Sept. 20, 1996) ("Report and Order").

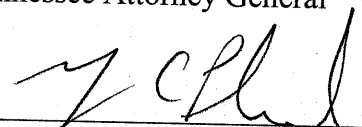
statewide system of telecommunications services by permitting competition in all telecommunications services markets, . . .” Therefore, the TRA has an obligation to ensure that payphone rates are nondiscriminatory in the State of Tennessee.

CONCLUSION


For the foregoing reasons, the Consumer Advocate of the State of Tennessee respectfully submits that Section 276 of the Telecommunications Act of 1996 be applied to all payphone companies, and established precedent dictates that the TRA implement the requirements to all telephone companies in the State of Tennessee, including the small telephone companies, in order to achieve the mandates established by Congress in Section 276.

Respectfully submitted,

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Dated: April 3, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, facsimile or hand delivery on April 3, 2003.

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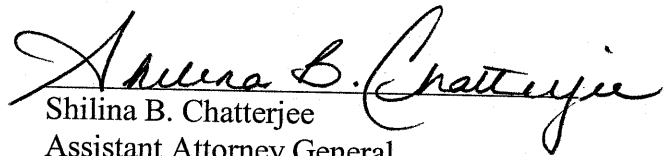
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